

1 The Honorable Benjamin H. Settle
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10 UNITED STATES DISTRICT COURT FOR THE
11 WESTERN DISTRICT OF WASHINGTON
12 AT TACOMA
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15 UNITED STATES OF AMERICA,
16 Plaintiff,
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18 v.
19 DONNIE BARNES, SR.,
20 Defendant.
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23 NO. CR18-5141BHS
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26 GOVERNMENT'S RESPONSE TO
27 DEFENDANT'S MOTION TO SUPPRESS
28 (Dkt 32)

29
30 **I. INTRODUCTION**

31 Defendant Donnie Barnes, Sr., molested a young girl and shared photos of his
32 abuse online. In March 2018, ICE-HSI¹ Special Agent Reese Berg obtained and
33 executed search warrants for his home and person. During that search, Barnes confessed
34 to his crimes against MV1, as well as possessing other child pornography. Here, he
35 challenges neither the factual basis for the search nor the circumstances under which he
36 was interviewed. Instead, grasping at straws, he offers two grounds he claims warrant
37 suppression of both the search and his confession. Both lack merit, and even if they did
38 not, suppression is neither available as a remedy nor warranted under the circumstances.

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1 First, Barnes says ICE-HSI obtained IP subscriber information from Comcast in
 2 violation of the Fourth Amendment. But that subscriber information belonged to K.T.,
 3 not Barnes, meaning he has no standing to assert this claim. And the Fourth Amendment
 4 does not protect information voluntarily provided to third parties, so there is no claim to
 5 present. Finally, Barnes errs when he claims that 19 U.S.C. § 1509 prohibits ICE-HSI
 6 from using summonses in child exploitation cases. But even if he were right, suppression
 7 would be improper and unwarranted where no constitutional violation occurred.

8 Second, Barnes grousers about the timing of the search and seeks suppression.
 9 Here, SA Berg provided ample justification to begin the searches before 6:00 a.m., and
 10 the reviewing magistrate judge expressly authorized his doing so. That is all Rule 41
 11 requires, and there is no basis for suppression. Moreover, Barnes offers no explanation
 12 why a search that occurred less than one hour before the time at which Rule 41 requires
 13 no special permission was unreasonable under the circumstances. Nor could he. Law
 14 enforcement acted in good faith, complying fully with Rule 41. And Barnes suffered no
 15 prejudice, nor was the search or its execution constitutionally deficient, rendering
 16 suppression unavailable.

17 In sum, Barnes offers no valid basis for suppression, and his motion should be
 18 denied without a hearing.

19 **II. FACTUAL AND PROCEDURAL BACKGROUND**

20 The relevant facts are largely undisputed. In February 2018, ICE-HSI Special
 21 Agent Reese Berg opened an investigation into an individual (later identified as
 22 Defendant Donnie Barnes, Sr.) who was sexually abusing a young girl and posting
 23 images of that abuse on the Internet. SA Berg began this investigation after he received a
 24 lead from Australian law enforcement. An Australian undercover officer had
 25 communicated with Barnes after Barnes posted sexually explicit images of a young girl
 26 on a public photo-sharing website.

27 Among the photos Barnes shared was a close-up photo of the genitals of a
 28 prepubescent female, MV1. MV1 was lying face down, and her underwear had been

1 pulled aside, exposing her buttocks and genitals. This photo was one in a series that all
 2 depicted the same young girl that Barnes posted to the site. After Barnes posted the
 3 images, the undercover initiated email correspondence with Barnes. In this
 4 correspondence, among other things, Barnes identified the victim in the photos as an
 5 eleven-year-old female. He told the undercover MV1 was his “sweet little toy” and
 6 described this child as “sexy,” “flirty,” and “fun to play with.” The undercover told
 7 Barnes that he had an eleven-year-old stepdaughter that he was just starting to groom and
 8 abuse. Barnes asked the undercover if he had any pictures of his victim to share.

9 The undercover officer obtained a list of IP logins for Barnes’s photo sharing
 10 website account, which showed numerous logins from various IP addresses between
 11 August 2017 and February 2018. Among the IP addresses used by Barnes to access this
 12 site in February 2018 was an IP address belonging to Comcast Communications. In
 13 response to a summons issued under 19 U.S.C. § 1509(a)(1), Comcast reported that
 14 during the time Barnes used IP address 73.140.63.12 to access the photo-sharing site, it
 15 was assigned to K.T. at her home in Spanaway, Washington, which she shared with
 16 Barnes and two minors. Ex. 1 at 205.

17 On March 2, 2018, SA Berg applied for and obtained warrants to search Barnes’s
 18 home and person for evidence of various child sexual exploitation offenses from
 19 Magistrate Judge Theresa L. Fricke. Based on law enforcement observations of Barnes’s
 20 workday schedule, SA Berg also sought (and received) permission to execute the search
 21 during the nighttime hours, that is, between 10:00 p.m. and 6:00 a.m. Ex. 2 at 00033,
 22 00040. Though, as noted in the affidavit, SA Berg planned to execute these warrants
 23 between 4:00 and 6:00 a.m., thereby maximizing the chances of encountering Barnes at
 24 home. As Barnes notes, law enforcement executed those warrants shortly after 5:00 a.m.
 25 on May 6, 2018, less than one hour before the 6:00 a.m. cutoff when Rule 41 requires no
 26 special authorization.

27 To minimize disruption to Barnes and the other occupants of the home and
 28 maximize the safety of all concerned, agents started surveillance in the early morning

1 hours of March 6, 2018. Agents did not approach the home to begin execution until
 2 surveilling agents reported seeing a light on within the home, suggesting that someone
 3 (likely Barnes) was awake. When agents knocked and announced their presence, Barnes
 4 answered the door. He was fully dressed and appeared ready to depart the house
 5 imminently.²

6 SA Berg encountered Barnes in the home, and Barnes agreed to be interviewed.
 7 In a post-*Miranda*, recorded interview, Barnes acknowledged, among other things:

- 8 • He was the user of the photo-sharing website who communicated with the
 9 Australian undercover officer and posted the images of MV1;
- 10 • He took the photo of MV1's genitals while she slept and had taken a number of
 11 other sexually explicit photos or videos of MV1 over the preceding months,
 12 which would be found on his Apple iPhone;
- 13 • He obtained a thumb drive containing several videos of child pornography
 14 from an unidentified individual after providing that individual some of MV1's
 15 underwear.

16 During the search, agents located Barnes's iPhone and the thumb drive he
 17 described. A forensic examination of those and other digital devices revealed Barnes
 18 had, in fact, taken other sexually explicit images and videos of MV1 and possessed a
 19 thumb drive containing several videos of other minors being sexually abused.

20 Barnes was taken into custody and charged by criminal complaint on the day of
 21 the search. The Grand Jury subsequently returned an Indictment charging Barnes with
 22 one count each of producing, distributing, and possessing child pornography. Trial is
 23 scheduled to begin June 25, 2019.

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 27 ² Much of the information surrounding the execution of the searches is detailed in the agent reports produced in
 28 discovery and does not appear to be in dispute. To the extent certain factual details are not, however, the
 government is proceeding by way of an offer of proof.

III. ARGUMENT

To place Barnes’s motion to suppress in context, it is important to note what he is not challenging. He is not, for example, challenging the showing of probable cause and does not suggest the reviewing magistrate judge abandoned her judicial role. Nor does he claim the affidavit contained material falsehoods. And he does not suggest that the search warrants were overbroad, lacked particularity, or otherwise suffer from constitutional defect. Rather, he identifies two alleged problems with the conduct of the investigation. Both are meritless, and neither are of constitutional import. Even if they had merit, they would not justify the extraordinary remedy of suppression.

First, Barnes wrongly asserts that the summons used to obtain subscriber information from Comcast was unlawful and violated his Fourth Amendment rights. Suppression is unavailable, however, because Barnes suffered no constitutional violation. Nor did anyone else for that matter. The subscriber information at issue was not his, depriving him of standing to assert any Fourth Amendment claim, and such information is not protected by the Fourth Amendment in any event, meaning there is no claim to press. As such, even if Barnes could show that the summons to Comcast violated Section 1509 (he cannot), suppression is unavailable for statutory violations that do not implicate constitutional rights.

Second, Barnes claims that the search of his home and person was unreasonable because it occurred at nighttime—that is, between 10:00 p.m. and 6:00 a.m. This “nighttime” search, occurring less than one hour before 6:00 a.m., was, however, expressly authorized by the reviewing magistrate judge upon a showing of good cause. That is all that is required by Rule 41. And even if the showing were deemed insufficient, suppression is unavailable to remedy mere technical violations of Rule 41 that are neither of constitutional magnitude nor result in prejudice to the defendant.

11

11

1 **A. Barnes cannot establish a constitutional violation that would warrant
2 suppression based on the seizure of another's subscriber information.**

3 Barnes's claim that the warrantless seizure of subscriber information violates the
4 Fourth Amendment utterly fails, and suppression is unwarranted for at least three reasons.
5 First, Barnes lacks standing to assert such a claim because the subscriber information at
6 issue is not his own but another's. Second, the subscriber information provided by
7 Comcast is not entitled to Fourth Amendment protection because customers cannot claim
8 a legitimate expectation of privacy over information voluntarily given to third parties.
9 Finally, even assuming *arguendo* Barnes suffered a constitutional deprivation, good faith
10 precludes suppression in this case.

11 **1. Barnes lacks standing to assert a Fourth Amendment claim that, if it
12 exists at all, belongs to another person.**

13 Barnes lacks standing to assert a Fourth Amendment claim over subscriber
14 information that does not belong to him and was provided to Comcast by another person,
15 K.T. It is a bedrock principle of constitutional law that "Fourth Amendment rights are
16 *personal* rights [that] . . . may not be vicariously asserted." *Brown v. United States*, 411
17 U.S. 223, 228 (1973) (emphasis added). The onus is on Barnes to "demonstrate that *he*
18 personally has an expectation of privacy in the place searched, and that *his* expectation is
reasonable." *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (emphases added).

19 This he cannot do. The "private subscriber data" that he complains ICE-HSI
20 illegally obtained is not *his* subscriber data but K.T.'s. Thus, the only person with cause
21 to complain about the seizure of this information, if there is a complaint to be heard, is
22 K.T. It was the IP address assigned to her account that led ICE-HSI to seek a search
23 warrant for the residence that she shared with Barnes. Barnes cannot vindicate
24 constitutional rights that belong to another, and that alone is fatal to his suppression
25 claim.

26 //

27 //

1 **2. The Fourth Amendment does not shield subscriber information**
 2 **maintained by internet service providers because customers have no legitimate**
 3 **expectation of privacy in that information.**

4 Barnes's Fourth Amendment claim fails for a second, independent reason: the
 5 Fourth Amendment does not protect information voluntarily provided to internet service
 6 providers by their customers. Thus, even if Barnes had standing to assert a Fourth
 7 Amendment claim over K.T.'s subscriber information, there is no such claim to assert.

8 A criminal defendant "may invoke the protection of the Fourth Amendment only if
 9 he can show that he had a "legitimate expectation of privacy" in the place searched or the
 10 item seized. *Smith v. Maryland*, 442 U.S. 735, 740 (1979). No such expectation of
 11 privacy can exist where, as here, information has been voluntarily shared with a third
 12 party. *Id.* at 740-45. Barnes thus bears the burden of establishing a reasonable
 13 expectation of privacy in the subscriber information K.T. provided to Comcast, a burden
 14 he cannot meet.

15 It is well-settled that a "person has no legitimate expectation of privacy in
 16 information he voluntarily turns over to third parties." *Id.* at 743-44. This longstanding
 17 doctrine is fatal to Barnes's argument. The only reason Comcast was able to provide his
 18 and K.T.'s address when ICE-HSI sought customer information associated with a
 19 particular IP address is because K.T. provided that information to Comcast voluntarily.
 20 Neither she nor Barnes may complain their privacy has been violated when the
 21 government obtains information she freely shared.

22 And indeed, to the government's knowledge, "[e]very federal court to address this
 23 issue has held that subscriber information provided to an internet provider is not
 24 protected by the Fourth Amendment's privacy expectation." *United States v. Perrine*,
 25 518 F.3d 1196, 1204-05 (10th Cir. 2008); *see also United States v. Corbitt*, 588 F. App'x
 26 594 (9th Cir. 2014); *United States v. Wheelock*, 772 F.3d 825, 828-29 (8th Cir. 2014);
 27 *United States v. Bynum*, 604 F.3d 161, 164 (4th Cir. 2010); *Guest v. Leis*, 255 F.3d 325,
 28 336 (6th Cir. 2001).

1 Anticipating this argument, Barnes looks to last term's *Carpenter* decision and
 2 invites this Court to do what the Supreme Court expressly declined to do: that is, eschew
 3 the third-party doctrine.³ The Court's decision not to extend the third-party doctrine to
 4 cell site location information was "a narrow one," grounded in the "unique" character of
 5 such information. *United States v. Carpenter*, 138 S. Ct. 2206, 2217-2220 (2018). Such
 6 records, the Court explained, "reveal[] not only [a person's] particular movements, but
 7 through them [the person's] 'familial, political, professional, religious, and sexual
 8 associations.'" *Id.* at 2217 (internal citation omitted). *Carpenter*, however made clear
 9 the decision in no way "disturb[s] the application of" the third-party doctrine, nor does it
 10 "address other business records that might incidentally reveal location information." *Id.*
 11 at 2220; *see also United States v. Contreras*, 905 F.3d 853, 857 (5th Cir. 2018) (rejecting
 12 the defendant's argument post-*Carpenter* that a subscriber has a reasonable expectation
 13 of privacy in ISP records revealing "only that the IP address was associated with" the
 14 defendant's residence).

15 In short, if his lack of standing were not already fatal to his request for
 16 suppression, the third-party doctrine surely is its undoing.

17 **3. In any event, suppression is unwarranted under the good faith
 18 doctrine.**

19 Assuming *arguendo* Barnes's Fourth Amendment rights were infringed, the good
 20 faith doctrine precludes suppression here. The exclusionary rule does not apply "where
 21 [an] officer's conduct is objectively reasonable," because suppression "cannot be
 22 expected, and should not be applied, to deter objectively reasonable law enforcement
 23 activity." *United States v. Leon*, 468 U.S. 897, 919 (1984). For that reason, "evidence
 24 obtained from a search should be suppressed only if it can be said that the law

25
 26 ³Indeed, with skill that would make Rumpelstiltskin himself envious, Barnes spins ISP subscriber information into
 27 the equivalent of a window into someone's very soul. It is not. What the government obtained was not some
 28 detailed journal of Barnes's every move or a laundry list of his favorite websites. What the government obtained
 was the service address for an IP address he used to exploit a child, an address that he did not even provide. Despite
 his laudable effort at creativity and hyperbole, it is clear there is no real privacy interest at stake here.

1 enforcement officer had knowledge . . . that the search was unconstitutional under the
 2 Fourth Amendment.” *Id.* (internal quotation marks omitted).

3 At the time SA Berg relied on the summons to Comcast, courts uniformly held
 4 (and thus far continue to hold) that basic subscriber information is not protected by the
 5 Fourth Amendment. As such, suppression would be improper since law enforcement
 6 reasonably relied on the state of the law as it existed.

7 The statutory scheme governing stored and electronic communications applies the
 8 same standard, only bolstering that good faith. Under this scheme, the government may
 9 obtain basic subscriber information, such as that requested from Comcast here, from an
 10 ISP via grand jury, trial, or administrative subpoena, including summonses under Section
 11 1509. 18 U.S.C. § 2703(c)(2); *see also United States v. Rubin*, 2 F.3d 974, 975 (9th Cir.
 12 1993) (holding a Section 1509 summons is an “administrative subpoena”).

13 In short, even taking Barnes’s claim that subscriber information is protected under
 14 the Fourth Amendment as true, the good faith doctrine would preclude suppression
 15 where, as here, such information had no such protection at the time it was obtained.

16 **B. Section 1509 authorized the summons to Comcast, and even if not,
 suppression is unavailable for statutory violations of nonconstitutional magnitude.**

17 Section 1509 authorizes ICE-HSI’s use of summonses to obtain records relevant to
 18 child exploitation offenses, subject matter long recognized to be within the purview of
 19 ICE-HSI. The summons to Comcast plainly sought records relevant to a child
 20 exploitation investigation, as it sought subscriber information for an IP address used by
 21 an individual distributing and seeking out child pornography on a foreign photo-sharing
 22 website. Barnes’s self-serving and crabbed interpretation of Section 1509 is wrong, and
 23 even if correct, suppression would be unavailable to remedy a statutory violation that
 24 does not implicate a defendant’s constitutional rights.

25 //

26 //

1 **1. Section 1509 plainly authorizes the issuance of summonses to**
 2 **investigate child exploitation offenses.**

3 Section 1509 of Title 19 provides that the Secretary of the Treasury (now, the
 4 Secretary of Homeland Security) may issue three categories of summonses (sometimes
 5 referred to as “Customs Summonses”) set forth in each of three subsections: Subsection
 6 (a)(1) grants the authority to summon records; subsection (a)(2) grants the authority to
 7 summon persons to appear; and subsection (a)(3) grants the authority to take testimony
 8 under oath. 19 U.S.C. § 1509(a)(1)-(3). Here, ICE requested records. *See* Ex. 1. Section
 9 1509(a)(1) thus controls and provides:

10 In any investigation or inquiry conducted for the purpose of ascertaining
 11 the correctness of any entry, for determining the liability of any person for
 12 duty, fees and taxes due or duties, fees and taxes which may be due the
 13 United States, for determining liability for fines and penalties, or for
 14 *insuring compliance with the laws of the United States administered by the*
 15 United States Customs Service, the Secretary (but no delegate of the
 16 Secretary below the rank of district director or special agent in charge)
 17 may—

18 (1) examine, or cause to be examined, upon reasonable notice, *any record*
 19 (which for purposes of this section, includes, but is not limited to, any
 20 statement, declaration, document, or electronically generated or machine
 21 readable data) described in the notice with reasonable specificity, which
 22 *may be relevant* to such investigation or inquiry.

23 19 U.S.C. § 1509(a)(1). Section 1509 clearly empowers ICE to request “any record” that
 24 “may be relevant” to an investigation or inquiry for ensuring “compliance with the laws
 25 of the United States administered by [ICE].” *Id.*

26 The summons here easily meets this standard. After all, “ICE has been
 27 traditionally responsible for investigating wrongdoing on a national and even global
 28 stage, and has had substantial duties in investigating and serving search warrants upon
 29 alleged purveyors of child pornography.” *United States v. Cray*, 673 F. Supp. 2d 1368,
 30 1377 (S.D. Ga. 2009). In particular, ICE-HSI is “tasked with investigating violations of
 31 18 U.S.C. § 2251, with which [Barnes] is charged in this case.” *United States v. Merrell*,
 32 88 F. Supp. 3d 1017, 1033 (D. Minn. 2015), aff’d 842 F.3d 577 (8th Cir. 2016). .

1 Courts have therefore had no trouble concluding that Section 1509 authorizes ICE
 2 (and thus HSI) to use summonses in connection with child exploitation investigations.
 3 For example, *Cray* held, “Customs Summonses were used to further a legitimate
 4 investigative purpose in compliance with the statute” when ICE agents conducting a child
 5 pornography investigation obtained the physical address associated with an IP address.
 6 673 F. Supp. 2d at 1377. Likewise in *Merrell*, the court concluded ICE did “nothing
 7 improper” when issuing a Section 1509 summons in connection with a child pornography
 8 investigation. 88 F. Supp. 3d at 1033. Indeed, 6 U.S.C. § 473(a)(1) provides that the
 9 Secretary of Homeland Security “shall operate, within [ICE-HSI], a Cyber Crimes
 10 Center” and that within the Cyber Crimes Center, there shall be a Child Exploitation
 11 Investigations Unit that “shall coordinate all [ICE] child exploitation initiatives.” 6
 12 U.S.C. § 473(b)(1)-(2). It should be no surprise, then, that ICE-HSI agents like SA Berg
 13 “are experts in investigating child exploitation offenses.” *United States v. Fletcher*, 763
 14 F.3d 711, 713 (7th Cir. 2014).

15 Surely Section 1509 sweeps within its scope the authority to issue summonses for
 16 records relevant to investigations that are a core part of the agency’s expertise and
 17 mission. ICE-HSI was working to ensure “compliance with the laws of the United States
 18 [it] administer[s].” 19 U.S.C. § 1509(a)(1). The summons used here therefore furthered
 19 “a legitimate investigative purpose in compliance with the statute.” *Cray*, 673 F. Supp. 2d
 20 at 1377.

21 Nothing Barnes offers in his motion supports a contrary view. He first says that
 22 the summons to Comcast is a problem because such summonses may only be used by the
 23 U.S. Customs Service (which no longer exists) and then only as part of an inquiry into
 24 import duties, tariffs, or other matters related to the importation of goods. That first
 25 concern is easily dismissed. DHS, and thus ICE, has the authority to use Section 1509
 26 summonses because the Homeland Security Act of 2002 transferred the functions of the
 27
 28

1 Customs Service to DHS. 6 U.S.C. § 203.⁴ Section 1512 of the Act provides,
 2 “[r]eferences relating to an agency that is transferred to the Department in statutes . . .
 3 shall be deemed to refer, as appropriate, to the Department [of Homeland Security].” 6
 4 U.S.C. § 552(d); *see id.* § 557. Section 1509 thus expressly authorizes DHS to use such
 5 investigative summons.

6 Invoking the statutory canon *noscitur a sociis*, Barnes claims that Section 1509’s
 7 reference to “laws of the United States administered by” DHS must be read to be limited
 8 only to matters of tariffs, import duties, and the like. That canon, however, typically
 9 applies to a series of words in a list, such as “prospectus, notice, circular, advertisement,
 10 [or] letter,” *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995) (internal quotation
 11 marks omitted), not to the meaning of an entire clause. Congress could easily have
 12 included words of limitation but did not. Barnes’s attempt to graft onto the statute his
 13 preferred language should be rejected.

14 Barnes also wrongly claims that his crabbed and self-serving interpretation of
 15 Section 1509 finds support within DHS itself. His entire focus, though, is the use of
 16 Section 1509 summonses by CBP agents. Nothing Barnes points to in his brief binds ICE
 17 (and thus HSI), which is a separate agency within DHS with its own distinct mission.
 18 And nothing about CBP’s use of 1509 summonses concerns ICE’s use of those same
 19 summonses given the division of responsibilities. After all, when DHS was created,
 20 “[p]rimary investigative jurisdiction in the enforcement of immigration and customs laws
 21 was transferred from Customs to [ICE].” *Callaway v. U.S. Dept. of Treasury*, 824 F.
 22 Supp. 2d 153, 155 n.2 (D.D.C. 2011) (internal quotation marks omitted).

23 In any event, the use of the summons at issue here is consistent with Barnes’s
 24 preferred interpretation. That is, he says 1509 summonses are limited to requests for
 25 information related to violations of Title 8 or Title 19. But investigations into the

27 ⁴ Under the Act, “the United States Customs Service was divided into the Bureau of Customs and Border Protection
 28 and the Bureau of Immigration and Customs Enforcement, both of which are part of the Department of Homeland
 Security.” *United States v. Reyeros*, 537 F.3d 270, 274 n.2 (3d Cir. 2008).

1 importation of child pornography are obviously “related” to provisions in Title 19
 2 prohibiting the importation of obscene materials and other contraband. Barnes also cites
 3 CBP’s statement that a Section 1509 summons should be used only where there is
 4 probable cause to believe that the records relate to the importation of merchandise that is
 5 prohibited. Given that Barnes discussed and sought to exchange child pornography with
 6 an undercover Australian officer via a foreign photo-sharing website, there was surely
 7 probable cause to believe he was attempting to import child pornography.

8 Second, relying on the incorrect statutory provision, Barnes complains that even if
 9 ICE-HSI has the power to issue the summons at issue here, the records that can be sought
 10 are limited to those defined in Section 1509(d)(1)(A). That definition, he explains,
 11 precludes ICE from compelling the production of customer records from an ISP. Here
 12 too he misses the mark.

13 The summons used here was a request for records, not a demand that someone
 14 appear in person. *See* Ex. 1. This is important because the statutory provisions
 15 governing these two types of summonses proscribe different limitations on what types of
 16 records may be sought. *Compare* 19 U.S.C. § 1509(a)(1) with *id.* § 1509(a)(2).
 17 Subsection (a)(1), unlike Subsection (a)(2), permits any records to be summonsed that
 18 “may be relevant” to the investigation or inquiry underway. 19 U.S.C. § 1509(a)(1). The
 19 Comcast records at issue here were obviously relevant to the investigation as they could
 20 assist in identifying the individual who was actively seeking to exchange child
 21 pornography with an Australian law enforcement officer.

22 And even if Section 1509(a)(2)—and its cross-reference to subsection (d)(1)(A)—
 23 applies, the summons at issue would satisfy its requirements. Subsection (d)(1)(A)(ii)
 24 defines “records” to include those “regarding which there is probable cause to believe
 25 that they pertain to merchandise the importation of which into the United States is
 26 prohibited.” The communications between Barnes and the Australian officer provided
 27 ample probable cause to believe that records from Comcast pertained to just such
 28 merchandise—namely, child pornography. *See United States v. Hale*, 784 F.2d 1465,

1 1466-1467 (9th Cir. 1986) (Child pornography is “merchandise imported contrary to law
 2 in violation of 19 U.S.C. § 1305 and 18 U.S.C. § 545.”). Thus, even under Barnes’s
 3 incorrect interpretation, the summons used by ICE-HSI fell within the scope of Section
 4 1509.

5 **2. Even if the summons were unlawful, suppression is unavailable to
 6 remedy statutory violations that do not implicate constitutional rights.**

7 Even assuming Barnes were correct that the summons to Comcast was unlawful,
 8 he is not entitled to suppression. “[T]here is no exclusionary rule generally applicable to
 9 statutory violations.” *United States v. Clenney*, 631 F.3d 658, 667 (4th Cir. 2011)
 10 (internal quotation marks omitted). The Supreme Court created the exclusionary rule as a
 11 “sanction that bars the prosecution from introducing evidence obtained by way of a
 12 Fourth Amendment violation.” *Davis v. United States*, 564 U.S. 229, 231-32 (2011). Its
 13 “sole purpose” is to “deter future Fourth Amendment violations.” *Id.* at 236-37. As such,
 14 the exclusionary rule has rarely been extended beyond the context of constitutional
 15 violations. Indeed, the Supreme Court has approved the exclusion of evidence for
 16 statutory violations only in cases where “the excluded evidence arose directly out of
 17 statutory violations that implicated important Fourth and Fifth Amendment interests.”
 18 *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348 (2006); *see also United States v. Abdi*, 463
 19 F.3d 547, 556 (6th Cir. 2006).

20 Barnes is thus not entitled to suppression because even if obtained unlawfully
 21 under Section 1509, the information is not, as detailed above, protected by the Fourth
 22 Amendment. Section 1509 provides no suppression remedy itself, and Barnes’s
 23 constitutional rights are in no way implicated by the Comcast summons. As such, there
 24 is no valid basis for suppression even assuming the summons whether or not the
 25 summons violated Section 1509. *See United States v. Smith*, 155 F.3d 1051, 1056 (9th
 26 Cir. 1998).

27 Equally important, suppression is a “last resort” not a “first impulse.” *Herring v.*
 28 *United States*, 555 U.S. 135, 140 (2009). Any benefit to doing so (general deterrence of

1 law enforcement misconduct) must outweigh the substantial social cost that results when
 2 “guilty and possibly dangerous defendants go free.” *Id.* at 140-41. Suppression’s
 3 “bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in
 4 the community without punishment. Our cases hold that society must swallow this bitter
 5 pill when necessary, but only as a last resort. For exclusion to be appropriate, the
 6 deterrence benefits of suppression must outweigh its heavy costs.” *Davis*, 564 U.S. at
 7 237 (internal citations and quotation marks omitted).

8 Here, Barnes cannot clear the “high obstacle” he must to justify application of the
 9 exclusionary rule. *Herring*, 555 U.S. at 141. The gravamen of Barnes’s argument is that
 10 suppression is critical to deter the government’s so-called widespread abuse of Section
 11 1509 summonses. If his gripe is that no agency or judicial officer has yet embraced his
 12 novel and unsupported statutory argument, his frustration is understandable. But that is
 13 hardly evidence of widespread abuse. He cites no court decision suggesting that 1509
 14 summonses are improper tools to further child exploitation investigations. And while he
 15 points to various statements concerning CBP’s use of these summonses, these have no
 16 bearing on the legitimacy of their use by ICE.

17 But even assuming this Court believes that 1509 summonses should not be used in
 18 the manner used in this case, the balancing required by the Supreme Court clearly
 19 disfavors suppression. The costs are obvious and substantial: a dangerous, hands-on sex
 20 offender may escape responsibility for his horrific crimes. The deterrent value is equally
 21 clear, but it is also negligible. The information at issue is not constitutionally protected.
 22 The deterrent effect will thus bear only on the manner in which the information is sought,
 23 not whether it is collected. After all, the same information is available through a grand
 24 jury subpoena or administrative subpoena issued under the authority of the Attorney
 25 General, 18 U.S.C. § 3486(a)(1). If widespread misuse of 1509 summonses is indeed
 26 cause for concern, then the entities best equipped to remedy that are the recipients of
 27 those summons, not criminal defendants. The price of suppression is always a high one.
 28

1 | Society should not be forced to bear that cost, the Supreme Court has explained, unless
 2 | necessary to vindicate important constitutional rights.

3 | **C. Suppression is unwarranted for a warrant executed just after 5:00 a.m. with
 4 | the express authorization of a Magistrate Judge.**

5 | Barnes's second basis for suppression fares no better. He groused that the search
 6 | of his home and person was unreasonable because it occurred at nighttime—that is, just
 7 | after 5:00 a.m. As a threshold matter, the daytime requirement for search warrants does
 8 | not come from the Fourth Amendment itself, which requires only reasonableness.
 9 | Instead, Rule 41 requires warrants be executed between 6:00 a.m. and 10:00 p.m. unless
 10 | the magistrate judge expressly authorizes execution at a different time based on a
 11 | showing of good cause. Fed. R. Crim. Proc. 41(e)(2)(A)(2)(ii).

12 | Here, SA Berg specifically requested authority to execute the warrants before 6:00
 13 | a.m. In fact, he told Magistrate Judge Fricke that he planned to execute the warrants not
 14 | at just any time of night, but between 4:00 and 6:00 a.m. In the affidavit, SA Berg
 15 | explained that observations of Barnes's morning schedule showed that he left his home
 16 | for work at or before 6:00 a.m. And given his experience, SA Berg told Magistrate Judge
 17 | Fricke that it would be preferable to execute these warrants with all occupants of the
 18 | home present. Given these representations and finding good cause, Magistrate Judge
 19 | Fricke authorized execution before 6:00 a.m. as required by Rule 41. *See* Ex. 2.

20 | SA Berg's request made sense. In a matter of days, ICE-HSI had identified
 21 | someone actively abusing a young girl. SA Berg acted quickly to gather the necessary
 22 | resources to conduct a safe and effective search operation. Though Barnes seems to
 23 | sneer at SA Berg's "preference," he is trivializing something that is far from trivial.
 24 | There are obvious investigative and safety advantages to having a single search team and
 25 | a single search location. Agents could have waited and conducted multiple searches in
 26 | multiple locations to be sure. But doing so might have risked Barnes's learning of the
 27 | investigation with time to destroy evidence. And it would have strained already limited
 28 |

1 resources in a case where time was of the essence and delay simply to have more
 2 personnel would have only risked further harm to a vulnerable victim.

3 This should be the end of the matter of course. But Barnes insists otherwise,
 4 demanding suppression because law enforcement executed search warrants at 5:16
 5 instead of 6:01 a.m. Other than saying SA Berg failed to state “good cause,” however,
 6 Barnes offers nothing to support his position. His opinion on the matter should surely be
 7 taken with a grain of salt, as he has a considerable amount to gain if his view were to
 8 carry the day. Defense counsel notes that he is unaware of the execution of a nighttime
 9 search in such a routine case in all his years of practice in this District. Government
 10 counsel is in a similar boat, as such requests are in his experience the exception, not the
 11 rule.

12 Rarity is not evidence of impropriety, however. Indeed, it is far likelier to suggest
 13 discretion and the exercise of judgment. In any event, the people in the best position to
 14 determine how most effectively and safely to execute a search warrant are those in the
 15 business executing them. One such person, SA Berg, obviously thought nighttime
 16 execution would be appropriate here in light of those considerations, and nothing Barnes
 17 offers calls that judgment into question.

18 Noting the paucity of authority on what constitutes good cause in this context,
 19 Barnes simply strings together a handful of cases that collectively stand for the
 20 unremarkable proposition that nighttime searches are particularly sensitive and must be
 21 justified. The one Ninth Circuit case he relies upon hardly sheds light on what good
 22 cause means or how it should be assessed. Rather, the court in that case expressed the
 23 view that a search supported by an affidavit containing material falsehoods should not
 24 have taken place at all, much less during “nighttime” hours. If that is Barnes’s point,
 25 then point taken.

26 But the government remains at a loss as to what exactly law enforcement was
 27 supposed to have done differently in this case. SA Berg explained how he hoped to
 28 execute the warrants, why earlier execution was necessary for doing so, and obtained the

1 express judicial authorization Rule 41 requires. If, with the benefit of hindsight, the
 2 Court believes that Magistrate Judge Fricke should have required more of SA Berg
 3 before authorizing an earlier execution, then so be it. But application of a suppression
 4 remedy in such a situation would do nothing to further the aims of the exclusionary rule.
 5 Suppression is meant to deter misconduct, not good faith attempts to comply with
 6 applicable rules. *Leon* thus surely precludes suppression here.

7 **D. Suppression is unwarranted because the search did not violate Barnes's
 8 Fourth Amendment rights and any alleged violation of Rule 41 was neither
 9 deliberate nor caused prejudice to Barnes.**

10 Even assuming Barnes is correct that good cause was lacking, he offers no real
 11 explanation as to how execution less than an hour before the 6:00 a.m. cutoff was
 12 unreasonable under the circumstances. Nor can he. Implicit in his criticism seems to be
 13 the notion that SA Berg and the rest of the agents were cavalier in their approach. In
 14 reality, they were anything but. They did not, for example, burst through the door
 15 unannounced in the middle of the night. While there may be circumstances where such
 16 tactics are appropriate, that was not the case here. Instead, agents set up surveillance and
 17 waited until someone was awake in the home. They then knocked and announced their
 18 presence, waited for Barnes to answer the door, and then proceeded with the execution of
 19 the search. There is simply no credible claim that law enforcement acted unreasonably or
 20 improperly.

21 And as the Ninth Circuit has explained, "we have repeatedly held—and have been
 22 instructed by the Supreme Court—that suppression is rarely the proper remedy for a Rule
 23 41 violation." *United States v. Williamson*, 439 F.3d 1125, 1132 (9th Cir. 2006).
 24 "Because the exclusionary rule tends to exclude evidence of high reliability, the
 25 suppression sanction should only be applied when necessary and not in any automatic
 26 manner." *United States v. Luk*, 859 F.2d 667, 671 (9th Cir. 1988) (affirming denial of
 27 suppression motion despite a technical violation of Rule 41). Whether exclusion is
 28 warranted "must be evaluated realistically and pragmatically on a case-by-case basis."

1 *Id.* (quoting *United States v. Vasser*, 648 F.2d 507, 510 n.2 (9th Cir. 1981), cert. denied,
 2 450 U.S. 928 (1981)).

3 Courts need not suppress evidence obtained in violation of Rule 41 unless the
 4 violation is of constitutional magnitude or involved either (1) prejudice in the sense that
 5 the search would not have occurred or would not have been so abrasive if law
 6 enforcement had followed the rule, or (2) bad faith such as intentional disregard of a
 7 provision in the Rule. *See United States v. Martinez-Garcia*, 397 F.3d 1205, 1213 (9th
 8 Cir. 2005). Here, any alleged Rule 41 violation was clearly not of constitutional
 9 magnitude and was neither deliberate nor a violation that caused prejudice to Barnes.
 10 Suppression is thus unavailable.

11 The Fourth Amendment demands three things of a search warrant: it must be
 12 issued by a neutral magistrate judge; it must be based on a showing of “probable cause to
 13 believe that the evidence sought will aid in a particular apprehension or conviction for a
 14 particular offense”; and it must satisfy the particularity requirement. *Dalia v. United*
 15 *States*, 441 U.S. 238, 255 (1978) (internal quotation marks omitted). Barnes does not
 16 claim any such defects, only that a search that occurred less than one hour before it would
 17 have normally been allowed under Rule 41 in the usual course was unreasonable under
 18 the Fourth Amendment. That surely will not suffice to establish a constitutional
 19 violation, when every indication is that the law enforcement complied scrupulously with
 20 constitutional requirements governing search and seizure.

21 Any potential Rule 41 violation was also not deliberate or the result of bad faith.
 22 How could it be? SA Berg sought the express authorization for an earlier search required
 23 by Rule 41, and Magistrate Judge Fricke granted it. Any noncompliance with Rule 41
 24 was clearly the result of deliberate disregard for the rule. Barnes also suffered no
 25 prejudice. The searches would have occurred irrespective of any Rule 41 violation, albeit
 26 a little later in the day.

27 By obtaining express permission from the magistrate judge to execute the warrants
 28 at night, the government honored the Fourth Amendment’s overriding safeguard:

1 interposing the judgment of a “neutral and detached magistrate” between themselves and
2 the defendant’s residence. *Johnson v. United States*, 333 U.S. 10, 14 (1948). The value
3 of the exclusionary rule is its ability to deter law enforcement misconduct and safeguard a
4 defendant’s constitutional rights. That goal would hardly be furthered by suppression
5 here, and Barnes’s motion should be denied.

6 **IV. CONCLUSION**

7 For all the foregoing reasons, the Court should deny Barnes’s motion to suppress
8 evidence in its entirety without any hearing.

9
10 DATED this 6th day of May, 2019.

11
12 Respectfully submitted,

13 BRIAN T. MORAN
14 United States Attorney

15 */s/ Matthew P. Hampton*
16 MATTHEW P. HAMPTON
17 Assistant United States Attorney
18 700 Stewart Street, Suite 5220
19 Seattle, Washington 98101
Telephone: (206) 553-7970
Fax: (206) 443-0755
E-mail: matthew.hampton@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the attorney(s) of record for the defendant.

s/Jenny Fingles
JENNY FINGLES
Legal Assistant
United States Attorney's Office
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
Phone: (206) 553-2270
FAX: (206) 553-0755
E-mail: jenny.fingles@usdoj.gov